

DEC 3 - 2008

U.S. BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA**

|                  |   |                            |
|------------------|---|----------------------------|
| In re:           | ) | Chapter 7                  |
|                  | ) | No. 4:08-bk-02510-EWH      |
| JASON POLKUS and | ) |                            |
| JAMIE POLKUS,    | ) |                            |
|                  | ) | <b>MEMORANDUM DECISION</b> |
| Debtors.         | ) |                            |

**I. INTRODUCTION**

The Debtors effectively rescinded a reaffirmation agreement on their truck by timely giving oral notice of the rescission to the creditor. The reasons for this conclusion are explained in the balance of this decision.

**II. FACTS AND PROCEDURAL HISTORY**

On March 12, 2008, the Debtors filed their Chapter 7 bankruptcy petition. On May 18, 2008, the Debtors entered a Reaffirmation Agreement ("Reaffirmation Agreement") with Altier Credit Union ("Altier") regarding a 2006 Nissan Truck ("Truck"). On June 16, 2008, Altier filed the Reaffirmation Agreement with the court. Three days after the Reaffirmation Agreement was filed, the Debtors called Altier to advise them they wished to return the Truck and cancel the Reaffirmation Agreement. An agent of Altier took possession of the Truck at some point on or after June 20, 2008. Altier remains in possession of the Truck. Debtors received a Chapter 7 discharge on July 21, 2008. On August 22, 2008, sixty-seven days after filing the

1 Reaffirmation Agreement with the court, the Debtors filed a notice of rescission and a motion  
2 to withdraw the Reaffirmation Agreement. Altier responded by filing an objection to the  
3 Debtors' motion on the grounds that rescission of the Reaffirmation Agreement was untimely  
4 and that Altier had not been properly noticed in writing of the Debtors' rescission. A hearing on  
5 the Debtors' motion was held on October 23, 2008, at which time the court took the matter  
6 under advisement.

### 8 **III. ISSUE**

9 Can a debtor orally give notice to a creditor of rescission of a reaffirmation agreement?  
10

### 11 **IV. STATEMENT OF JURISDICTION**

12 Jurisdiction is proper under 28 U.S.C. §§ 1334 and 157(b)(2)(A).  
13

### 14 **V. DISCUSSION**

15 The Bankruptcy Code provides that a reaffirmation agreement is enforceable only if  
16 "the debtor has not rescinded such agreement at any time prior to discharge or within sixty  
17 days after such agreement is filed with the court, whichever occurs later, by giving notice of  
18 rescission to the holder of such claim." 11 U.S.C. § 524(c)(4).<sup>1</sup> Debtors argue that because  
19 § 524(c)(4) does not explicitly include a requirement that notice of rescission be in writing,  
20 oral notice to creditors is sufficient.<sup>2</sup> Debtors' argument hinges on the meaning of the phrase  
21 to "give notice."  
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24 <sup>1</sup> Unless specified otherwise, all chapter and code references are to the Bankruptcy Code,  
25 11 U.S.C. §§ 101-1532. The Federal Rules of Bankruptcy Procedure, Rules 1001-9037, are referred  
to as Rules.

26 <sup>2</sup> The Debtors did provide written notice of rescission to Altier on August 22, 2008. However  
27 this notice clearly was untimely as it was not given within 60 days of filing the Reaffirmation Agreement  
or prior to entry of discharge. 11 U.S.C. § 524 (c)(4).  
28

1 In construing the meaning of a statute, the starting point is the plain meaning of the  
2 statute's language. United States v. Tobeler, 311 F.3d 1201, 1203 (9th Cir. 2002). "Notice" is  
3 not defined by the bankruptcy code; accordingly, the Court may consider dictionaries in order  
4 to determine the plain meaning of the term. Ariz. Health Care Cost Containment Sys. v.  
5 McClellan, 508 F.3d 1243, 1249-50 (9th Cir. 2007). Black's Law Dictionary defines "notice"  
6 as:

7 Legal notification required by law or agreement, or imparted by  
8 operation of law as a result of some fact (such as the recording of  
9 an instrument); definite legal cognizance, actual or constructive, of  
10 an existing right or title.... A person has notice of a fact or  
11 condition if that person (1) has actual knowledge of it; (2) has  
12 received a notice of it; (3) has reason to know about it; (4) knows  
about a related fact; or (5) is considered as having been able to  
ascertain it by checking an official filing or recording. 2. The  
condition of being so notified, whether or not actual awareness  
exists.... 3. A written or printed announcement.... Cf.  
KNOWLEDGE.

13 Black's Law Dictionary 1087 (7th ed.1999).

14 Accordingly, "notice" can refer to transmitting a fact either orally or in writing. See In re  
15 Rincon Island Ltd. Partnership, 253 B.R. 880, 886-887 (Bankr. C.D.Cal. 2000) (interpreting  
16 the notice requirements of § 546(b), the court held that the plain meaning of "giving notice" is  
17 to inform or to provide information and nothing more). The Sixth Circuit B.A.P. has reached a  
18 similar conclusion. See In re Booth, 242 B.R. 912, 916 (B.A.P. 6th Cir. 2000). The Booth  
19 court found that § 524 does not require that notice of rescission of a reaffirmation agreement  
20 be in writing; it simply requires that notice of rescission be given to the creditor. Id. The Booth  
21 court also held that parties to a reaffirmation agreement could negotiate a provision requiring  
22 that the debtor's rescission of the agreement be in writing. Id. In this case, however, the only  
23 provision in the Reaffirmation Agreement regarding notice states, "To rescind (cancel) your  
24 reaffirmation agreement, you must notify the creditor that your reaffirmation agreement is  
25 rescinded (or canceled)." (Reaffirmation Agreement, dk. 19, pg. 4, para. 4). There is no  
26 requirement in the Reaffirmation Agreement that notice be in writing. Also, there is no  
27  
28

1 question that Altier had actual knowledge or reason to know that the Debtors had rescinded  
2 the Reaffirmation Agreement because Altier repossessed its collateral, with the Debtors'  
3 consent, after the Debtors gave oral notice of their decision to rescind.

4 Altier contends, however, that the noticing provisions in § 342 apply to § 524(c)(4) and,  
5 therefore, notice of rescission must be given in writing. Section § 342 includes several  
6 provisions concerning debtors' obligations to give notice to creditors.<sup>3</sup> Specifically,  
7 § 342(c)(1) provides: "If notice is required to be given by the debtor to a creditor under this  
8 title, any rule, any applicable law, or any order of the court, such notice shall contain the  
9 name, address, and last 4 digits of the taxpayer identification number of the debtor."  
10 However, the language of § 342(c)(1) does not require that the information be conveyed by  
11 written notice. In contrast, § 342(b) explicitly requires the Clerk provide "written notice" in  
12 certain situations. Had Congress intended to require written notice in § 342(c)(1), it could  
13 have done so expressly, as it did in the immediately preceding subsection. "[Where]  
14 Congress includes particular language in one section of a statute, but omits it in another  
15 section of the same Act, it is generally presumed that Congress acts intentionally and  
16 purposely in the disparate inclusion or exclusion." Russello v. United States, 464 U.S. 16, 23  
17 (1983) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1974)). Congress  
18 could have explicitly included a written notice requirement within § 342(c)(1), but did not.

19 However, both § 342(c)(2) and § 342(e) require, in certain situations, that notice be  
20 sent by a debtor to a specified address. The requirement that notice be sent by the debtor to  
21 a specific address arguably creates an implicit written notice requirement. American Bankers  
22 Ass'n v. Gould, 412 F.3d 1081, 1086 (9th Cir. 2005) (citing Food & Drug Admin. v. Brown &  
23 Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (holding that the words of the  
24 Bankruptcy Code must be read in context and with a view to their place in the overall  
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26 <sup>3</sup> 11 U.S.C. § 342 was amended in 2005 when Congress passed the Bankruptcy Abuse  
27 Prevention and Consumer Protection Act, Pub. L. 109-8.

1 statutory scheme)). However, both § 342(c)(2) and § 342(e) require a creditor to take specific  
2 action before the requirement that written notice be sent by the debtor is triggered.

3 Section 342(c)(2) requires notice be sent to a specific address, but only if within 90 days of  
4 the petition date the creditor supplied the debtor with at least two communications which  
5 provided the address where the creditor wished correspondence to be sent. In this case,  
6 there is no evidence that Altier sent the Debtors the communications necessary to invoke  
7 § 342(c)(2).

8 Section 342(e) allows a creditor to file with the court and serve on the debtor an  
9 address to be used when noticing the creditor. Section 342(e) requires that the creditor's  
10 address request must be both filed with the court and served on the debtor to be operative.  
11 (emphasis added). There is no evidence that Altier served on the Debtors notice of the  
12 address it requested be used for providing notice.<sup>4</sup> Therefore, § 342(c)(2) and § 342(e) are  
13 not applicable to this case.

14 Additionally, at an October 23, 2008, hearing in this case, counsel for Altier argued that  
15 any notice given by the Debtors was not effective because it was not given to a person or  
16 department responsible for receiving notice as required by § 342(g)(1). However, § 342(g)(1)  
17 only applies to notices that are not given in accordance with the other requirements of § 342  
18 and further only apply if the creditor has established reasonable procedures to deliver notices  
19 to responsible persons or departments. Altier has not established that the notice given in this  
20 case was not in accordance with the requirements of § 342 or that it has established  
21 reasonable procedures for delivery of notices. Section 432(g)(1), therefore, cannot be the  
22 basis for requiring a written notice of rescission from the Debtors to Altier.

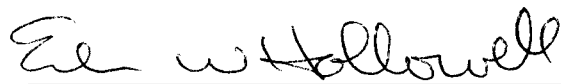
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26 <sup>4</sup> The court takes judicial notice that no docket entries show the Debtors were served with  
27 notice of address as required by § 342(e). See State of Florida v. Charley Toppino & Sons, Inc., 514  
28 F.2d 700, 704 (5th Cir. 1975)(holding the court may take judicial notice of its own orders and of records  
in a case before it).

1 **VI. CONCLUSION**

2 The noticing requirements of § 524(c)(4), when read in context with § 342, do not  
3 require a debtor to give written notice of rescission of a reaffirmation agreement unless the  
4 creditor has complied with the requirements of § 342(c)(2) or § 342(e). In this case, because  
5 Altier did not comply with the requirements of § 342(c)(2) or § 342(e), oral notice by the  
6 Debtors of rescission of the Reaffirmation Agreement is sufficient. Therefore, creditor's  
7 objection to Debtors' rescission of the Reaffirmation agreement is DENIED.

8 DATED: December 3, 2008.

9  
10 

11 Eileen W. Hollowell  
U.S. Bankruptcy Judge

12 Notice to be sent through the  
13 Bankruptcy Noticing Center "BNC"  
to the following:

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